



DEPARTMENT OF JUSTICE

Antitrust Division

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January 17, 1997

Jesse B. Grove, III, Esq.
Thelen, Marrin, Johnson & Bridges
330 Madison Avenue
New York, New York 10017-5001

Dear Mr. Grove:

This is in response to your request, on behalf of seventeen attorneys, for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department of Justice's antitrust enforcement intentions with respect to a proposal under which your clients ("the lawyers' group") would provide legal services to construction industry clients on a returnable flat fee basis ("the plan").

The applicants are seventeen attorneys from sixteen different firms, located in thirteen cities, who currently provide legal services to construction industry clients, *i.e.*, property owners, contractors, design professionals, subcontractors and suppliers. Apparently some participants in construction projects have expressed their concern over the high costs of litigation and/or arbitration involving construction contract disputes, and indicated a belief that traditional legal fee arrangements create incentives for attorneys "to prolong and intensify disputes."

To allay the above noted concerns, members of the lawyers' group would offer to represent a construction industry client for a flat fee that would be returnable in full if, at either client's discretion, litigation or arbitration was required to resolve a dispute. The new fee arrangement would be offered where each major participant in a construction project agreed to be represented by an attorney who was a member of the lawyers' group, and each attorney was retained on a refundable flat fee basis.

Each attorney would remain free to negotiate the amount of his/her flat refundable fee, but each would know that the attorneys who represented other parties to the construction project had similar incentives to avoid litigation or arbitration of disputed issues. Member attorneys also will remain free to withdraw from the lawyers' group and to accept client engagements on different or similar terms without withdrawing from the group. Thus, member attorneys, while participating in this program, may also participate in other joint sales programs and/or offer their legal services on a traditional individual attorney basis.

On the basis of the information and assurances that you have provided us, the Department of Justice has no current intentions of instituting antitrust

enforcement action against the proposal of the lawyers' group to offer legal services to construction industry clients on a returnable flat fee basis. The proposed conduct does not appear to raise any competitive concerns. There will be no agreement on fee levels amongst the members of the lawyers' group. Instead, each attorney-member will retain the right to negotiate the level of the flat fee with the client. Moreover, each attorney retains the right to withdraw from the group, or to join other joint sales programs or pursue individual fee arrangements while remaining a member of the lawyers' group. In view of the fact that there are thousands of attorneys who offer legal services to construction industry clients, the proposed agreement amongst seventeen attorneys to offer their services in an interdependent legal fee arrangement on a non-exclusive basis would not appear to raise prices, reduce output or diversity, erect barriers to entry or in any other way restrain competition.

Under the circumstances, the proposed conduct could have a procompetitive effect. To the extent that utilization of a returnable flat fee structure reduces legal costs, either directly or by reducing uncertainty relating to such potential costs, construction industry participants will secure benefits without having to sacrifice any competitive options.

For these reasons, the Department is not presently inclined to initiate antitrust enforcement action against the lawyers' group's proposed conduct. This letter, however, expresses the Department's current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring any enforcement action in the future if the actual operation of any aspect of the proposed legal services program proves to be anticompetitive in any purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10 (c) of the Business Review Procedure.

Sincerely,

/S/

Joel I. Klein
Acting Assistant Attorney General

enclosures